

BOOK REVIEWS

Mahendra P. Singh, *Comparative Constitutional Law*, Eastern Book Co. 1989, xv + 526.

Comparative Constitutional Law is a volume of essays designed as a Festschrift in honour of Professor P. K. Tripathi on his retirement in 1989. During his distinguished career Professor Tripathi twice visited the University of Melbourne Law School, once in 1971 as the Lever Hume Fellow and again in 1979 as Distinguished Visiting Professor. The library holdings on the Indian Constitution and the lingering tradition of interest in Indian constitutional law in the Faculty owe much to these visits. For these reasons it is particularly appropriate that the Melbourne University Law Review carry a review of his Festschrift volume, which also serves as a timely reminder of more recent constitutional developments in India with which we may have been losing touch.

Two contributions in the book survey the life and work of Professor Tripathi himself. Apart from his period of service on the Law Commission of India from 1971-77, Professor Tripathi's significant influence on the constitutional development of India has been through his activities as a legal academic, primarily at the Universities of Delhi and Allahabad. His academic career began shortly after the independence of India and the establishment of the Constitution. In the introduction to this volume, his biographer characterizes his role ever since as that of observer, analyst and critic of interpretation of the Constitution by the Supreme Court of India, with a view to ensuring that the evolution of the Constitution through judicial review was appropriate, consistent and conducive to its 'dignity and sanctity'. The principal themes of his work are examined more closely in an epilogue by the editor on Professor Tripathi's contribution to constitutional law. They include the role of the courts *vis-à-vis* the other organs of government in constitutional development; fundamental rights under the Indian Constitution including the rights to equality, personal liberty and freedom of religion, speech and property; the balance between fundamental rights and the 'directive principles' of the Constitution; centre-state relations; freedom of trade, commerce and intercourse; and constitutional amendment.

The organization of the 29 essays in this volume reflect these themes to a degree. The six substantive parts of the book broadly cover theories of constitutionalism and judicial review, issues arising from constitutional transition or turmoil, constitutional guarantees of civil, political, economic and social rights, and the structure and control of the administration. The contributors are drawn primarily from North America, Europe and India, with important contributions also from Sweden and Japan. In general the essays are of high quality, suffering a little in some cases where English is not the author's first language. This is not intended as a criticism: the subject matter of some of these essays might not otherwise be available in English at all, to our loss. The book is a valuable resource for the growing number of people who believe that future constitutional development in Australia should take place in the light of knowledge and understanding of approaches to comparable constitutional questions in other countries.

It is impossible in a review of this length to deal comprehensively with such a diverse range of contributions. Four essays or themes therefore have been selected for specific comment, primarily because of their interest to this reviewer. Readers with different priorities may find other contributions equally rewarding. Two which are likely to be of general interest are Christian Starck's piece on 'Freedom of Expression and Academic Freedom' which has some bearing on the looming Australian debate on the proposed academic charter of rights and freedoms and Jill Cottrell's clear and informative description of the background to the Hong Kong Basic Law in 'One Country, Two Systems'.

The first essay for particular mention is 'The Politics of the Constitution' by Yash Ghai, one of the leading scholars of constitutional systems in third world countries. Professor Ghai uses the Ningkan litigation in Malaysia to convey two basic messages. The litigation was merely part of a complex

series of events involving Chief Minister Ningkan of Sarawak, who was dismissed by the Governor on the ground that he had lost the confidence of the majority in the legislature. He successfully alleged in the High Court that the dismissal was invalid because a no confidence vote had not been passed on the floor of the legislature; however, he was dismissed again by the Governor following a no confidence vote of the legislature convened by the Governor himself in the exercise of authority conferred under the emergency powers of the federal government, and lost a challenge to the proclamation of the emergency in the Privy Council.

The first message is that Constitutions cannot be understood in isolation from the rest of the power structure in society. Thus in the Ningkan case, Ghai argues, the courts' presumption of good faith on the part of the government ignored 'the politics of the controversy': the desire on the part of the Sarawak opposition, politically aligned with the federal government, to gain for themselves the advantages of the apparatus of state in the struggle for power and to deny them to Ningkan. This message has relevance to all constitutional systems. It suggests at the very least the need for a broader approach to the study of constitutions and probably also the need for some fundamental thinking about how constitutions might more accurately reflect the principal sources of public power.

Ghai's second message concerns the particular problems that constitutionalism faces in Third World countries, where Western constitutional forms have become the instrument for shaping new economic and political systems. The consequence, he argues, is that: 'Far from being an umpire over the political process, the constitution becomes a weapon in the process and is frequently manipulated to achieve partisan ends, while at the same time the rhetoric of constitutionalism and the rule of law is flourished'. The analysis is supported by his case-study, in which all participants used or abused the literal text of the constitution and accused their opponents of constitutional impropriety. The relationship of Western constitutional principles to traditional structures and customary law is a major issue in most of the countries in the geographical region in which Australia and New Zealand are located and is likely to become increasingly pressing in the future.

A second group of three papers appears in Part V of the volume, entitled *Constitutional Foundations of Administrative Law and Relationship between the Executive and the Administration*. They cover aspects of the topic in relation to Germany, Japan and Sweden. Each is valuable as a source of information about this fundamental and practical aspect of government in the country concerned. Equally importantly for present purposes, the issues covered are of current significance in Australia in the 1990s. They include the extent to which legislative authority is or should be required for executive action, the relationship between the political executive and the administration, and the appropriate balance between protection of individual rights and interests on the one hand and administrative efficiency and discretion on the other. Some of the solutions proposed, in terms of greater public participation in the primary decision-making process, are also gaining currency here.

Public participation also is a theme of an essay by Rudolph Dolzer on 'The Role of the Courts in the Preservation of Federalism'. Dolzer develops his argument through a comparison of the approaches of the courts in the United States and West Germany to constitutional disputes over the operation of the federal system. The issues which he identifies as common to those two countries are familiar in Australia as well. They include the perennial question whether federalism is merely a stage on the way to another, neater, form of government; the significance of the conflict between federalism on the one hand and national economic management and social and economic equality on the other; and the respective roles of the courts and the political process in preserving a federal structure. Dolzer is sceptical of the effectiveness of the political process as the sole arbiter of a federal constitution and dismissive of arguments that such questions are inappropriate for resolution by courts. He suggests that the apparent conflict between federalism and other constitutional goals should be resolved through a debate which takes into account 'the virtues of pluralism, diversity, experimentation, absence of large-scale majoritarianism and centralized bureaucracy, and . . . the preservation of freedom by a horizontal layer of the separation of powers'.

A final series of papers by Errabbi, Singh, Rao and Narain canvasses the important contemporary debate in India on the meaning of the fundamental constitutional guarantees and in particular the guarantee of personal liberty; the appropriate balance between the directive principles of state policy in the Constitution and the fundamental guarantees; and the scope of the power of constitutional

amendment. The jurisprudence on these issues in India, which is continuing to evolve, is of issue to constitutional scholars everywhere. As the analysis of Mahendra Singh makes clear, Professor Tripathi has already played a major part in the debate that has taken place. It is to be hoped that he will continue to do so.

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